

BOARD OF APPEALS CASE NO. 5100

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BEFORE THE

APPLICANT: Alvin J. Sadler, Jr.

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ZONING HEARING EXAMINER

**REQUEST: Variance to allow a shed within
the recorded easement in the R1/COS District;
103 Bigmount Court, Abingdon**

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 11/29/00 & 12/6/00

HEARING DATE: December 20, 2000

Record: 12/1/00 & 12/8/00

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Alvin J. Sadler, Jr., is requesting a variance pursuant to Section 267-26C(6) of the Harford County Code, to allow an accessory structure within a recorded easement in the R1 Urban Residential District.

The subject parcel is within the Overview Manor subdivision at 103 Bigmount Court, Abingdon, Maryland 21009 and is more particularly identified on Tax Map 56, Grid 3F, Parcel 443. The parcel consists of 15,000 square feet, is zoned R1/COS, and is entirely within the First Election District.

Mrs. Roxanne Sadler, wife of the Applicant appeared and testified that she and her husband own the subject property. She and her husband have already constructed a shed to the rear of their property which is 14 feet by 20 feet and 12 feet high. The property is rectangular in shape and, in addition to a two story home, has a pool in the back yard area. The property is relatively flat until the very rear of the yard which drops steeply creating a 6 foot elevation. There is a ten foot drainage and utility easement to the rear of the yard. While the shed is 5 feet from the side yard line and 3 feet from the rear yard line, the shed is 7 feet within the recorded easement.

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The Conway Management Company, Inc. represents the Overview Manor II Homeowner's Association. Applicant's Exhibit 1 is a letter dated June 6, 2000 from Conway indicating approval for construction of the shed. Additionally, in the file and attached to the Department of Planning and Zoning Staff Report dated December 5, 2000 was a memo signed by Cheryl Banigan of the Department of Public Works, wherein the Department of Public Works approved the location of the shed within the easement so long as it was not mounted on a permanent foundation, and should the shed ever be found to contribute to a drainage problem it must be removed at the owner's expense. The shed is mounted on posts which rest upon pored concrete pads. The Applicant, Alvin Sadler, testified that it would be costly to remove the shed but he agreed to do so if it were required at some time in the future. The Applicant and his wife both stated that they intended to plant trees around the shed to act as screening.

Mr. Anthony McClune appeared and testified that the Department of Planning and Zoning had reviewed the request and inspected the property and recommends approval of the request. The Department felt that the severe slope to the rear of the property as well as the elevation difference between the subject parcel and adjoining properties made the parcel unique. In recommending approval, the Department of Planning and Zoning stated, "The Department of Planning finds that the property is unique. The requested variance should not adversely impact the intent of the Code and/or adjacent residential properties. The Department of Public Works has reviewed the request and determined that the location of the shed will not adversely effect drainage."

Appearing in opposition to the request was Mr. Anthony Casalena who, together with his family, lives next door to the subject property. Mr. Casalena stated that the shed is an eyesore that rises well above his property. By referring to several photos entered as Protestants' Exhibits 1-6, the witness pointed out that his property is at an elevation approximately 5-6 feet below the Applicant's parcel. Because of the difference in elevation of the two properties coupled with the severe slope of the Applicant's property, the shed appears much larger than it actually is according to the witness. Mr. Casalena felt that his property was being adversely impacted by the presence of such a large building looming overhead.

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When asked if moving the shed in toward the house the five feet necessary to be outside of the easement would be an improvement, the witness stated that it would because part of the shed could then be below the fence and not visible and that the elevation distance between the two yards would not be quite as great. The witness also felt that the Applicant, if allowed to keep the shed where it is, would be receiving a special consideration because the shed is already built. Mr. Casalena's wife also appeared and testified and expressed some of the same views as her husband.

CONCLUSION:

The Applicant is requesting a variance from the provisions of Section 267-26C(6) of the Harford County Code, to erect a shed within a recorded easement (5 foot encroachment requested). Section 267-26C(6) provides:

"No accessory use or structure, except fences, shall be located within any recorded easement area."

The Harford County Code, pursuant to 267-11 permits variances and provides:

"Variances from the provisions or requirements of this Code may be granted if the Board finds that:

- (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Code would result in practical difficulty or unreasonable hardship.
- (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Code or the public interest."

The facts of this case are not in dispute. Without obtaining a permit, the Applicant began construction of a shed on his property and, at the time of the hearing, the shed was nearly entirely complete. Unfortunately, the Applicant chose a location that encroaches into a recorded easement. The Hearing Examiner, while not insensitive to the potential impact on the Applicant, must examine this case as if the shed were not already erected and the Applicant were seeking to locate this same shed at this location.

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In making the determination the Hearing Examiner first must determine if the property has unique topographical features that impose a disproportionate impact on this property as opposed to other neighboring properties. The Hearing Examiner disagrees with the Department of Planning and Zoning in this case and finds that the property is not unique as that word is intended within the context of zoning. Uniqueness has been defined by the Maryland Court of Appeals as, "...the property whereon structures are to be placed (or uses conducted) is, in and of itself, unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness or peculiarity of the property causes the zoning provision to impact disproportionately upon the property." Cromwell v. Ward, 102 Md. App. 691, 651 A.2d 424 (1995). In the instant case, the property does slope severely to the rear of the house, however, the slope of the property did not dictate the location of the shed. The Applicant chose a location as far rearward from the house and pool as possible but the shed could have been placed at a location within the yard that would not have required a variance. The topographical features of the property, therefore, have not, in the opinion of the Hearing Examiner, played any part in dictating the location, size or height of the Applicant's shed.

Even if it was arguable that the severe sloping and location of the easement contributed to the decision to locate the shed in its present location the Hearing Examiner finds that these topographical characteristics did not impose practical difficulty or an unreasonable hardship. The shed could have been located outside of the easement even with the severe sloping present. It is true that it will be difficult and costly to remove the shed to a location on the property outside the easement, however, the Cromwell, supra, the Court made it clear that, "Self-inflicted or self-created hardship is never considered proper grounds for a variance. Where an Applicant creates a non-conformity, the Board lacks the power to grant a variance." The Court went on to say, "It is not the purpose of the variance procedures to effect a legalization of a property owner's intentional or unintentional violation of the zoning requirements."

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This reasoning was applied to a building constructed higher than the permit indicated, where the height listed on the permit was unintentionally written incorrectly. Cromwell, supra. Similarly, this rationale has been applied by the Maryland Courts in denying a gazebo located in a critical area inadvertently. North v. St. Mary's County, 99 Md. App. 502, 638 A.2d 1175 (1994); a swimming pool within the critical area placed there unintentionally and without knowledge of the critical area location, White v. North, 121 Md. App. 196, 708 A.2d 1093 (1998). "In the zoning context, it is denial of a reasonable use that creates an unwarranted hardship and where a reasonable use exists, generally an unwarranted hardship will not". North v. St. Mary's County, supra.

Moreover, the Hearing Examiner, based on the substantial photographic evidence presented, finds the structure both formidable and imposing. The structure seems to hover over the adjoining property and differs significantly from other structures in the neighborhood. If this same shed were moved further to the front of the yard it would not appear as elevated as it presently does. The aesthetic ambience would be improved, albeit minimally as a result of the relocation. "Where the grant of a variance (as to setback and area restrictions) would affect the aesthetic ambience of the residentially zoned properties in the immediate area, such action would be in disharmony with the spirit and intent of the regulations." Daihl v. County Bd. Of Appeals of Baltimore County, 258 Md. 157, 265 A.2d 227 (1970).

While the Hearing Examiner finds the result of the inquiry unfortunate, the hardship created in this case was of the Applicant's own making and should not be legitimized through the zoning process absent the necessary findings of Code Section 267-11. Pursuant to the facts presented, the Hearing Examiner, therefore, recommends that the application herein be denied.

Date JANUARY 17, 2001

William F. Casey
Zoning Hearing Examiner